



Mwongela ((Suing as personal representative of the estate of Henry Mutie Mwongela)) v Waema & 4 others (Environment & Land Case E012 of 2021) [2022] KEELC 12682 (KLR) (30 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12682 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E012 OF 2021
CG MBOGO, J
SEPTEMBER 30, 2022**

BETWEEN

**ANNUNCIATA NTHAMBI MWONGELA APPLICANT
(SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HENRY
MUTIE MWONGELA)**

AND

**JULIUS MUSUMBI WAEMA 1ST RESPONDENT
JULIUS KALIMU MUKELI 2ND RESPONDENT
DISTRICT SURVEYOR MAKUENI 3RD RESPONDENT
DEPUTY COUNTY COMMISSIONER, KILUNGU SUB-COUNTY 4TH
RESPONDENT
REGISTRAR OF LANDS, MAKUENI COUNTY 5TH RESPONDENT**

RULING

1. What is before this court for determination are two notice of preliminary objections dated May 18, 2021 and June 17, 2021 respectively.
2. The notice of preliminary objection dated May 18, 2021 is filed by the 1st and 2nd respondents in objection to the plaint and the notice of motion application dated April 21, 2021 on the following grounds: -
 1. That the *Land Adjudication Act* cap 284 empowers officials appointed under the Act to determine disputes. The said officials include the minister who is empowered to hear an appeal from the land adjudication officer against his decision in objection.



2. Section 29 provides that his decision is final thus it cannot be challenged in a court of law.
3. The plaintiff accepted the boundary of the court to be marked it is illogical for her to change her mind.
4. All the officers were empowered by law and did not exceed the jurisdiction given in the Act.
3. The notice of preliminary objection dated June 17, 2021 is filed by the 3rd, 4th and 5th respondents in objection to the plaint on the following grounds: -
 1. That this suit offends the provisions of section 29 of the [Land Adjudication Act](#) cap 284 which provides that the minister's decision is final.
 2. That the suit seeks to challenge an administrative decision which ought to be challenged by way of judicial review in accordance with order 53 of the [Civil Procedure Rules](#).
4. The applicant did not file a response to the notice of preliminary objections and neither did she file written submissions.
5. The 1st and 2nd respondents filed written submissions dated July 23, 2021. The 1st and 2nd respondents submitted that when the area under which parcel 769 and 1082 were declared an adjudication section, the 2nd respondent filed a claim under the [Land Adjudication Act](#) whereas the applicant filed a conflicting claim and the adjudication committee heard the case and confirmed the boundary sought by the applicant which was marked by the demarcation officer but was objected to by the 2nd respondent. The 2nd respondent then lodged an appeal to the arbitration board which confirmed the decision of the committee and went on to the adjudication officer who confirmed the arbitration board boundary.
6. That being dissatisfied with the adjudication officer's decision, the 2nd respondent lodged an appeal to the minister who heard the appeal and set aside the boundary marked by the committee and confirmed by the adjudication officer resulting to the institution of this suit. The 1st and 2nd respondents submitted that in all these stages, the 1st respondent was not involved in the dispute.
7. The 1st and 2nd respondent submitted that in all the dispute resolution mechanisms provided under the [Land Adjudication Act](#), the applicant did not object to the jurisdiction of the quasi-judicial tribunals provided therein and that it was not until the deputy county commissioner marked the boundary quashing the boundary of the demarcation officer that the applicant then filed this suit in court. The 1st and 2nd respondent further submitted that the location of the court was in dispute and each party had his own description of the court boundary.
8. The 1st and 2nd respondent submitted that under section 29 (1) of the [Land Adjudication Act](#), the decision of the minister is final and cannot be challenged. Further, that the deputy county commissioner made his decision and the surveyor and the land registrar implemented the decision of the minister. The 1st and 2nd respondents relied on the case of [Timotheo Makenge v Manunga Ngochi](#) 1979.
9. The 3rd, 4th and 5th respondents filed written submissions dated June 30, 2021. They raised two issues for determination as follows: -
 - a. Whether this suit offends the provisions of section 29 of the [Land Adjudication Act](#).
 - b. Whether this suit ought to have been initiated by way of a judicial review application in accordance with order 53 of the [Civil Procedure Rules](#).



10. On the first issue, the 3rd, 4th and 5th respondents submitted that the applicant seeks to challenge the decision of the minister issued in minister case No 132 of 2016 on the basis that the deputy county commissioner, Kilungu had no jurisdiction to hear the appeal. They submitted that the minister has delegated this mandate to the deputy county commissioner who acted within the powers delegated upon her by the minister. They relied on the case of *Gilbert Joseph Kabunjia v Land Adjudication and Settlement Officer, Meru South & 3 others; County Government of Tharaka Nithi (interested party)* [2019] eKLR.
11. The 3rd, 4th and 5th respondents further submitted that the *Land Adjudication Act* provides an elaborate procedure for handling disputes emanating from the land adjudication process which procedure was exhausted by the parties in this suit and therefore this court cannot sit as an appellate court in this matter but only exercise its supervisory jurisdiction through a judicial review process. They relied on the case of *Corave Amranth (Suing on behalf of the late Amarnath Gupta) v Patricia Kazungu & 2 others* [2021] eKLR and *John Masiantet Saeni v Daniel Aramat Lolungiro & 3 others* eKLR.
12. On the second issue, the 3rd, 4th and 5th respondents submitted that the applicant is calling upon this court to relook at the decision of the minister which is an administrative action and that it is evident that the plaint herein is meant to appeal against the decision of the minister. They relied on section 7 of the *Fair Administrative Action Act*, and the case of *John Masianted Saeni* (supra).
13. I have carefully analysed both notice of preliminary objections and the written submissions filed by the respondents and the issue for determination is whether the application and the main suit offends the provisions of section 29 of the *Land Adjudication Act*.
14. A preliminary objection was described in the Mukisa Biscuits Manufacturing Co. Ltd...West End Distributors Ltd (1969) EA 696 to mean: -

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir Charles Nebbold, JA stated that: -

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

15. This court having made a finding on the description of a preliminary objection, it is not in doubt that a preliminary objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from



elsewhere or the court is called upon to exercise judicial discretion. In the case of *Quick Enterprises Ltd v Kenya Railways Corporation*, Kisumu HCCC No 22 of 1999, the court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

16. I have perused the plaint dated April 19, 2021 and my attention has been drawn to paragraphs 8-10 of the same which I would wish to reproduce here. Paragraph 8 reads as follows:- “ moreover, the 1st and 2nd defendants have filed a multiplicity of illegal proceedings with the land adjudication officer in Makueni seeking to have the boundaries of parcel number 769 altered through a reduction of land area albeit the director of surveys has affirmatively determined the boundaries and delimitation of the parcel per the maps prepared pursuant to the court judgment in civil suit number 35 of 1969.” Paragraph 9 reads “the plaintiffs assert that amongst the notable proceedings intended to alter the decision of the court of August 19, 1969 in civil suit number 35 of 1969 is appeal case No 132/2016 which was adjudicated by the deputy county commissioner, Makueni *vide* a decision dated December 7, 2019, which has necessitated the institution of this suit.” Paragraph 10 reads “The plaintiffs claim that the 3rd and 4th defendants lack the jurisdiction to adjudicate land disputes, including boundary claims and that they assumed jurisdiction which both parties do not possess in law.”
17. The applicant goes on ahead to plead continued acts of illegalities committed by the respondents which seek to reduce acreage of her parcel of land. A plain reading of the above quoted paragraphs indicate that the applicant was indeed aggrieved by the decision of the minister and therefore sought redress in this court.
18. Of greater concern to this court is the minister’s decision annexed to the applicant’s supporting affidavit marked as “ANM7” which was delivered on December 7, 2019. In the appeal to the minister which was before Rebecca W Ndirangu-deputy county commissioner, the applicant was present in person and therefore she participated in the proceedings and during which she never raised the issue of jurisdiction of the dispute resolution mechanisms provided under the *Land Adjudication Act*.
19. Section 29 of the *Land Adjudication Act* provides as follows:
 - “(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the minister by—
 - (a) delivering to the minister an appeal in writing specifying the grounds of appeal; and
 - (b) sending a copy of the appeal to the director of land adjudication, and the minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final”.(emphasis mine)
20. In my opinion, if the applicant wished to challenge the illegalities of the minister in arriving at the final decision, she would have come under judicial review. This position has been restated in the case of *Lepore Ole Maito v Letwat Kortom & 2 others* [2016] eKLR where the court considered the



application of the provisions of the *Land Adjudication Act* with particular regard to the dispute resolution mechanism and stated:

“The Act provides an appropriate mechanism for resolution of any disputes. The minister is the apex in that dispute resolution mechanism and once an appeal is made to the minister and determined under the provisions of section 29 of the Act, such determination is deemed final and is not subject to any appeal. A party therefore aggrieved by the minister’s decision can only challenge such determination by way of judicial review and not otherwise if he considers the minister acted wrongly or exceeded his jurisdiction.”

21. Arising from the above, the notice of preliminary objections dated May 18, 2021 and June 17, 2021 respectively are upheld. The plaint dated April 19, 2021 and the notice of motion application dated April 19, 2021 are hereby struck out with costs to the respondents. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON 30TH SEPTEMBER, 2022.

MBOGO C.G

JUDGE

30/9/2022

In the presence of: -

CA: Timothy Chuma

